Supreme Court, U.S.
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No. 95-1260

In The

Supreme Court of the United States

October Term, 1995

RALPH P. EAGERTON, JR., AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, *et al.*,

Petitioners,

v.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Alabama Court of Civil Appeals correctly interpreted *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), when it found that Code of Alabama 1975, section 40-17-150, violated the Commerce Clause of the United States Constitution because it imposed a cost-per-mile driven in Alabama that was, on average, at least 6.78 times greater for non-Alabama-based interstate motor carriers than it was for Alabama-based interstate motor carriers?

LIST OF PARTIES TO PROCEEDINGS BELOW

Petitioners (Defendants-Appellants Below):

James M. Sizemore, Jr., Commissioner of Revenue of the State of Alabama, now succeeded by Ralph P. Eagerton, Jr., Honorable Guy Hunt, Governor of Alabama, now succeeded by the Honorable Forest Hood James, Governor of Alabama, James H. Evans, Attorney General of the State of Alabama, now succeeded by Jeff Sessions, Attorney General of the State of Alabama, and Commissioners James Sullivan, Charles Martin and Janice Cook of the Alabama Public Service Commission.

Respondents (Plaintiffs-Appellees Below):

Owner-Operator Independent Drivers Association, Inc., Shirley A. Wendt d/b/a Shirley's Express, Douglas and Sons, Inc., B.B. Express, Inc., Gary M. Sprague d/b/a Lazy S. Trucking Co., Inc., Weir Motor Freight Corp., Charles L. King d/b/a Exempt Commodities Transport, Siebert Farms, Inc., and Charles H. Floyd d/b/a Enterprises, Inc.

None of the corporate Respondents has a parent corporation or a nonwholly owned subsidiary that would be required to be listed pursuant to Supreme Court Rule 29.6.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Owner-Operator Independent Drivers Association, Inc., *et al.*, on behalf of themselves and as class representatives of others similarly situated, respectfully request that this Court deny Petitioners' Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, *et al.*, Petition for a Writ of Certiorari (the "Petition") seeking review of the Certificate of Judgment of the Supreme Court of Alabama denying Petitioners' Petition for Writ of Certiorari for review of the decision of the Alabama Court of Civil Appeals. The Certificate of Judgment of the Supreme Court of Alabama appears in Appendix A ("App. A") of the Petition, and the Opinion of the Alabama Court of Civil Appeals appears in Appendix B ("App. B") of the Petition.

STATUTES INVOLVED

In addition to the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, and the 1975 Alabama statute codified at Ala. Code § 40-17-150 (1975), both included as appendices to the Petition, this brief involves one federal statute, 49 U.S.C.A. § 31705 (1995), and two additional Alabama statutes, Ala. Code § 40-17-140 (1975) and Ala. Code § 40-17-150 (Supp. 1995). The complete text of each statute is set forth in Appendix H, Appendix I, and Appendix J, respectively.

COUNTERSTATEMENT OF THE CASE

This is a class action proceeding involving a challenge to the constitutionality of an identification marker fee established under former Ala. Code § 40-17-150 (1975) (hereinafter the "Marker Fee"). *See* Appendix G to Petition ("App. G") at 1g-2g. This provision imposed a fee of $12.00 for an identification marker or decal to be displayed upon each vehicle operated by an interstate motor carrier traveling into or through the State of Alabama during a given tax year.[1] In addition to raising revenue, the purpose of this requirement was to demonstrate the vehicle's compliance with the State's fuel use tax reporting system. Section 40-17-140(2) of the 1975 Alabama Code establishes the definition of "motor carrier" in such a way as to exempt from the identification Marker Fee all intrastate carriers and single vehicle not-for-hire interstate carriers.[2]

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[1] The Alabama statute, in pertinent part, provided as follows:

> (a) The commissioner shall provide by regulation for the issuance of an identification marker for every such motor vehicle for a fee of $12.00 per vehicle per year. The identification marker shall be in such form and of such size as the commissioner may prescribe.

Ala. Code § 40-17-150 (1975); for the full text of the statute, *see* App. G to Petition.

[2] Subsection (2) of section 40-17-140 defines "motor carrier" as:

> Every person, firm, or corporation who or which operates or causes to be operated on any highway in this state any motor vehicle, as defined herein, *except any resident person, firm, or corporation owning or*

The Circuit Court for Montgomery County entered summary judgment for the plaintiff class holding, *inter alia*, that the Marker Fee violated the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. In particular, that court held that (1) the Marker Fee was facially discriminatory because it was imposed upon interstate motor carriers while intrastate motor carriers and Alabama operators of single trucks not-for-hire remained exempt, and (2) the Marker Fee was also discriminatory in its practical effect because it imposed a cost-per-mile of operation that was, on average, at least 6.78 times greater for non-Alabama-based interstate motor carriers than for Alabama-based interstate motor carriers, citing *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987). *See* Appendix D to Petition ("App. D") at 2d-3d. The Alabama Court of Civil Appeals affirmed the judgment of the Circuit Court. *See* App. B to Petition at 7b. The Alabama Supreme Court denied Petitioners' petition for a writ of certiorari on November 9, 1975. *See* App. A to Petition.

On April 21, 1994 (while this matter was pending on appeal), the State of Alabama amended Ala. Code § 40-17-150 (1975) effectively repealing the provisions of the 1975 Code found to be unconstitutional in this litigation. The Alabama legislature, pursuant to Act of Apr. 21,

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> *operating not more than one such motor vehicle for his own use and not for hire, and except any person, firm or corporation the motor vehicles of which are operated or caused to be operated wholly within this state.*

Ala. Code § 40-17-140(2) (1975) (emphasis added), attached hereto in Appendix I ("App. I").

1994, No. 586, § 7, 1994 Ala. Acts 1078, 1081-83 (codified as amended at Ala. Code § 40-17-150 (Supp. 1995)), authorized the Department of Revenue to enter into the International Fuel Tax Agreement ("IFTA") as mandated by the federal Intermodal Surface Transportation Efficiency Act of 1991 § 4008(g), 49 U.S.C.A. § 31705 (1995) (hereinafter "ISTEA"), attached hereto as Appendix H ("App. H"). The IFTA requires signatories to honor identification markers issued by other signatories of IFTA. The State of Alabama amended Code of Alabama 1975, section 40-17-150, to conform to this requirement. The Code of Alabama 1995 now provides as follows:

> (a) The commissioner shall provide by regulation for the issuance of an annual identification marker for every *Alabama IFTA-based carriers' qualified vehicles* and the *qualified vehicles from non-IFTA-member jurisdictions*, as defined in Article 9 of Chapter 17 of this title, for a *fee based on administrative costs* of administering the agreements pursuant to Article 9 of Chapter 17 of this title. The identification marker shall be in the form and of the size as the commissioner may prescribe.

Ala. Code § 40-17-150 (Supp. 1995) (emphasis added), attached hereto as Appendix J ("App. J"). Thus, section 40-17-150 now provides for a *cost-based* marker fee to be imposed only upon qualified vehicles of *Alabama IFTA-based* carriers and qualified vehicles of carriers from *non-IFTA jurisdictions*. All states are required by federal law to join IFTA by September 30, 1996. 49 U.S.C.A. § 31705(a). As of this writing, it is believed that forty-four of the fifty states have already joined IFTA. As a practical matter, therefore, Alabama no longer imposes the Marker Fee

that was ruled unconstitutional on non-Alabama-based interstate carriers because the overwhelming majority of those carriers are based in other states that are signatories of IFTA. In addition, all fees that are imposed are cost-based fees and not taxes.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE ISSUE RAISED BY PETITIONERS IS WITHOUT CONTINUING IMPORTANCE

A. The State of Alabama Has Amended Its Statute And Eliminated Its Constitutional Defects

The offending statute has been amended by the State of Alabama and thus does not pose an issue of continuing importance. Under Ala. Code § 40-17-150 (Supp. 1995), the State of Alabama has ceased to collect the Marker Fee from non-Alabama IFTA-based interstate motor carriers. The State of Alabama's decision to amend the statute under attack in the proceedings below and to correct its constitutional flaws renders further review by this Court unnecessary.

B. Virtually All Other States Have Abolished Marker Fees Of The Kind Challenged In This Case

Marker fees of the kind at issue here have been uniformly abolished as individual states have, pursuant to ISTEA, implemented the IFTA. States participating in IFTA have agreed to honor identification markers issued by other signatories of IFTA rather than requiring all out-

of-state carriers to pay a tax and acquire a marker. As a consequence, the sole issue raised by Petitioners, whether the Alabama Court of Civil Appeals erred in its application of *Scheiner* to Alabama's identification Marker Fee, is without continuing importance beyond the four corners of this litigation.

II. THE DECISION BELOW THAT ALABAMA'S MARKER FEE DISCRIMINATES IN ITS PRACTICAL EFFECT IS IN HARMONY WITH DECISIONS BY OTHER COURTS OF LAST RESORT

The decision for which review is sought is in complete harmony with the way other courts have followed this Court's decision in *Scheiner*. Like Alabama, other courts have followed *Scheiner* and have uniformly overturned flat taxes of the type at issue here when they were found to be discriminatory in their practical effect.[3]

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[3] *See, e.g., Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 10 (1st Cir. 1992) (finding unconstitutional a statute under which non-Puerto Rican truckers paid five or six times more per accident than local truckers); *Government Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1281 (7th Cir. 1992) (holding that flat registration fee on out-of-state truck waste haulers resulted in unlawful practical discrimination, similar to the five-to-one cost discrimination that existed in *Scheiner*), *cert. denied, Bayh v. Government Suppliers Consol. Servs., Inc.*, 113 S. Ct. 977 (1993); *American Trucking Ass'ns, Inc. v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988) (declaring per-vehicle HUE tax illegal because it cost non-Arkansas-based truckers more per mile to travel on Arkansas roads than Arkansas truckers), *cert. granted sub nom., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Business Regulation*, 488 U.S. 954 (1988) *and aff'd in part and rev'd in part sub nom., American Trucking Ass'ns, Inc. v. Smith*, 496 U.S.

Petitioners do not point to any confusion or lack of harmony in the way other courts have interpreted and applied *Scheiner*. Petitioners point to no theory under which the Alabama courts are out of step with decisions in other jurisdictions. There is simply no reason for this Court to review a decision by the Alabama courts that is in complete harmony with existing precedent.

III. PETITIONERS DO NOT CHALLENGE THE DECISION BELOW THAT THE ALABAMA MARKER FEE WAS FACIALLY DISCRIMINATORY AND THUS UNCONSTITUTIONAL

The judgment of the Circuit Court for Montgomery County, affirmed by the Alabama Court of Civil Appeals

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167 (1990); *Black Beauty Trucking, Inc. v. Indiana Dep't of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax Ct. 1988) (finding that out-of-state truckers paid up to 48 times more per mile driven in Indiana, under $50.00 per-vehicle highway use fee, than Indiana truckers); *Commonwealth of Ky., Transp. Cabinet v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) (finding supplemental $175.00 per-vehicle highway user fees resulted in out-of-state truckers traveling through Kentucky paying three to 100 times more than local truckers); *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014, 1017 (Me. 1991) (finding that out-of-state truckers paying $25.00 per-vehicle hazardous waste license fee paid up to 49 times more than did local truckers); *American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955, 957 (Md. 1988) (finding annual $25.00 per-vehicle motor fuel use marker decal an unconstitutional flat tax); *American Trucking Ass'ns, Inc. v. Secretary of Admin.*, 613 N.E.2d 95, 98-103 (Mass. 1993) (holding $7.00 per-vehicle motor fuel use licenses and a $200.00 per-vehicle hazardous waste license fee were unconstitutional flat taxes); *American Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (holding $50.00 per-vehicle motor fuel user license an unconstitutional flat tax).

and the Supreme Court of Alabama, held that Ala. Code § 40-17-150 (1975) violated the Commerce Clause of the U.S. Constitution for two reasons: (1) it was discriminatory in its practical effect under *Scheiner*, 483 U.S. at 286; and (2) the statute was facially discriminatory because it was not imposed upon intrastate carriers and single vehicle not-for-hire interstate carriers. *See* App. D to Petition at 2d-3d. Even if the Petition were granted by this Court to review the issue of discrimination in effect under *Scheiner*, there would be no cause to disturb the decision below which would still stand by virtue of the separate finding of facial discrimination, a finding which is *not* challenged in the pending Petition.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

49 U.S.C.A. § 31705 (1995). Fuel use tax.

(a) Reporting Requirements. – After September 30, 1996, a State may establish, maintain, or enforce a law or regulation that has a fuel use tax reporting requirement (including any tax reporting form) only if the requirement conforms with the International Fuel Tax Agreement.

(b) Payment. – After September 30, 1996, a State may establish, maintain, or enforce a law or regulation that provides for the payment of a fuel use tax only if the law or regulation conforms with the International Fuel Tax Agreement as it applies to collection of a fuel use tax by a single base State and proportional sharing of fuel use taxes charged among the States where a commercial motor vehicle is operated.

(c) Limitation. – If the International Fuel Tax Agreement is amended, a State not participating in the Agreement when the amendment is made is not subject to the conformity requirements of subsections (a) and (b) of this section in regard to the amendment until after a reasonable time, but not earlier than the expiration of –

(1) the 365-day period beginning on the first day that States participating in the Agreement are required to comply with the amendment; or

(2) the 365-day period beginning on the day the relevant office of the State receives written notice of the amendment from the Secretary of Transportation.

(d) Nonapplication. – This section does not apply to a State that was participating in the Regional Fuel Tax

Agreement on January 1, 1991, and that continues to participate in that Agreement after that date.

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1032.)

Ala. Code § 40-17-140 (1975). Definitions.

For the purpose of this article, the following terms shall have the meanings respectively ascribed by this section:

(1) MOTOR VEHICLE. Any passenger vehicle that has seats for more than nine passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles.

(2) MOTOR CARRIER. Every person, firm, or corporation who or which operates or causes to be operated on any highway in this state any motor vehicle, as defined herein, except any resident person, firm, or corporation owning or operating not more than one such motor vehicle for his own use and not for hire, and except any person, firm or corporation the motor vehicles of which are operated or caused to be operated wholly within this state.

(3) OPERATIONS. Operations of all motor vehicles, whether loaded or empty, whether for compensation or not for compensation, and whether owned by or leased to the motor carrier who operates them or causes them to be operated.

(4) MOTOR FUEL. Gasoline, diesel fuel, and any other inflammable liquid or substance by whatever name it may be known and sold, the use of which is as a fuel for the propulsion of motor vehicles.

(5) COMMISSIONER. The Commissioner of the State Department of Revenue.

(6) GASOLINE TAX. The tax imposed by Article 2 of this chapter and by Article 6 of this chapter.

(7) DIESEL FUEL TAX. The tax imposed by Sections 40-17-1 through 40-17-20 and by Article 6 of this chapter. (Acts 1961, No. 674, p. 925, § 1; Acts 1965, No. 750, p. 1357, § 1; Acts 1980, No. 80-428, p. 595.)

Ala. Code § 40-17-150 (Supp. 1995). Annual identification markers.

(a) The commissioner shall provide by regulation for the issuance of an annual identification marker for every Alabama IFTA-based carriers' qualified vehicles and the qualified vehicles from non-IFTA-member jurisdictions, as defined in Article 9 of Chapter 17 of this title, for a fee based on administrative costs of administering the agreements pursuant to Article 9 of Chapter 17 of this title. The identification marker shall be in the form and of the size as the commissioner may prescribe.

(b) The identification marker shall be attached or affixed to the vehicle in the place and manner prescribed by the commissioner so that the same is clearly displayed at all times.

(c) The identification markers herein provided for shall be issued on an annual basis as of January 1 each year and shall be valid through the next succeeding December 31.

(d) All identification markers issued by the commissioner shall remain the property of the state.

(e) For tour buses, as defined in subdivision (10) of Section 40-19-1, the fee levied by this section (fuel identification marker fee or trip permit fee) and the motor carrier registration fee levied pursuant to paragraph a. of subdivision (5) of Section 37-3-32 shall be paid by a single payment which may be paid by check, money order, or other means as may be provided by regulation and shall be submitted to the Department of Tourism and Travel payable to the Department of Revenue.

(f) The proceeds from the issuance of the identification marker fees collected shall accrue to the credit of, and be deposited in, the Public Road and Bridge Fund.

(g) It shall be a violation of this article for a motor carrier to operate or cause to be operated in this state any motor vehicle as defined herein unless the motor vehicle displays the required identification marker in the manner designated by the commissioner; provided, that the commissioner by regulation may exempt from the requirement for displaying the identification marker such motor vehicles as urban and public transit motor vehicles or others if in his discretion they are clearly identifiable and the effective enforcement of this article will not suffer thereby.

(h) In addition, the Commissioner of Revenue may authorize the operation of a motor vehicle without the identification marker required by issuing a trip permit, valid for not exceeding seven days, for a fee to be set by regulation based on administrative costs of administering the agreements pursuant to Article 9 of Chapter 17 of this title payable in advance. Trip permits are to be obtained by motor carriers having only occasional or infrequent trips into and through the state. To be valid a trip permit must be supported by a valid invoice of current date showing that sufficient tax-paid fuel was purchased in the state to propel the vehicle for the number of miles it traveled over the highways of the state.

(i) In order for the department to have sufficient time in which to prepare the identification markers for transmittal to the motor carrier, every motor carrier subject to this article shall, between the dates of October 1

and November 15 of each year, furnish to the Department of Revenue an application, listing all motor vehicles operated by the motor carrier and for which an identification marker is required, giving for each vehicle the make, serial number, and type fuel used. The application shall be accompanied by a remittance in an amount sufficient to cover the fee or fees herein provided for.

(j) Motor carriers acquiring additional motor vehicles after the date of November 15 of each year must obtain an identification marker for each motor vehicle before operating the motor vehicle over the street and highways of this state. (Acts 1961, No. 674, p. 925, § 11; Acts 1965, No. 750, p. 1357, § 6; Acts 1971, No. 1408, p. 2403; Acts 1992, 2nd Ex. Sess., No. 92-710, p. 205, § 2; Acts 1994, No. 94-586, p. 1078, § 7.)